STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED May 21, 2009
v	No. 282965 Ingham Circuit Court
DAVID CHRISTMAS LEWIS, Defendant-Appellant	LC No. 07-001171-FH

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual fourth offender, MCL 769.12, to 180 to 360 months' imprisonment. Defendant appeals as of right and we affirm.

On August 27, 2007, around 10:30 p.m., defendant entered Jonathan and Ashley Insanas' home without their permission. After several tense moments, defendant picked up an empty water bottle and held it in a way that Jonathan described as threatening. Defendant left the home without further incident. Defendant claims that he had entered the home by mistake looking for an acquaintance named Crystal.

Defendant first argues that there was insufficient evidence to convict him of first-degree home invasion. He admitted at trial that he entered the Insanas' home without their permission and that they were home at the time. He argues, however, that insufficient evidence was adduced to prove either that the Insanases were placed in fear of an imminent battery, or that he had the specific intent to place them in fear of an imminent battery. We disagree.

In a criminal case, a challenge to the sufficiency of the evidence is reviewed de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find beyond a reasonable doubt that all essential elements of the prosecution's case were proven. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This is a deferential standard requiring the reviewing court to draw all reasonable inferences and resolve credibility issues in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A rational trier of fact could reasonably conclude from the evidence adduced below that defendant was guilty of first-degree home invasion beyond a reasonable doubt. The first-degree home invasion statute provides, in relevant part as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
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> * * *
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> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2)(b).]

An assault is "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). "[T]he jury should be instructed that there must be either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery." *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979).

At trial, Jonathan testified that when defendant picked up the water bottle he made a threatening gesture. Jonathan testified that he thought that defendant's act in picking up the water bottle signaled that defendant intended to become physically aggressive. He stated that he thought defendant was going to hit him with or throw the bottle at him. Based on this testimony, a rational juror could conclude that Jonathan was placed in fear or apprehension of an imminent battery.

Defendant argues that Jonathan's testimony is insufficient to establish an assault because Jonathan did not actually say that he feared defendant would hit him with the water bottle until after the prosecutor had asked him more probing questions. Defendant mischaracterizes the testimony at trial. Certainly, Jonathan did not actually use the words "fear" or "assault" until after plaintiff had asked more probing questions. However, these questions came after Jonathan had already stated that defendant had made a threatening gesture toward him after picking up the water bottle. There was nothing improper about plaintiff asking Jonathan clarifying questions about this statement. That Jonathan did not actually use the words "fear" or "assault" until after he was asked clarifying questions goes toward the weight and credibility of his testimony. It is a well-settled principal that questions regarding the credibility of witnesses are left to the trier of fact. See, e.g., *People v Palmer*, 392 Mich 370, 376; 220 NW2d 393 (1974).

Defendant also argues that there was insufficient evidence that he intended to commit an assault. He asserts that his intent cannot be inferred from simply picking up the bottle and holding it while looking around. "[I]ntent is a secret of a man's mind into which no one can look, and he discloses it by words or by action." *People v Gill*, 8 Mich App 89, 93; 153 NW2d 678 (1967). Accordingly, minimal circumstantial evidence will suffice to establish a defendant's state of mind, which can be inferred from all the evidence presented. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Contrary to defendant's argument, there was sufficient circumstantial evidence presented upon which a rational trier of fact could conclude that defendant specifically intended to place Jonathan in fear or apprehension of an imminent battery. Jonathan testified that defendant picked up the water bottle after Jonathan moved from behind the couch and began walking toward defendant. Jonathan also testified that when defendant picked up the water bottle, he held the bottle off to the side at about shoulder height. Jonathan stated that the manner in which defendant picked up and held the bottle made Jonathan feel that things "took a turn towards more him being physically aggressive towards me." "I was thinking that I was going to have to protect my house at that point," Jonathan testified. Both Insanases testified that they thought defendant looked like he was going to hit Jonathan with the water bottle. As sole judge of the facts, and in a position to assess the credibility of the witnesses, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002), the jury could have reasonably rejected defendant's assertion that his confusion in both going to the residence and then acting erratically when inside was influenced by his intoxication. When viewed in the light most favorable to plaintiff, this testimony is sufficient evidence to show that defendant intended to cause Jonathan to fear or apprehension of an imminent battery.

Next, defendant argues that his trial counsel's failure to request an instruction for the lesser included offenses of second-degree home invasion, MCL 750.110a(3), and misdemeanor entry without permission, MCL 750.115, deprived him of effective assistance of counsel. Second-degree home invasion and misdemeanor entry without permission are necessarily lesser included offenses of first-degree home invasion. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003); *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to have counsel effectively assist in the presentation of one's case. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination of whether a defendant received effective assistance requires a focus on the assistance actually received. *Id*. at 596. Because effective counsel is presumed, a defendant who challenges his counsel's assistance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show that (1) trial counsel's actions fell below that of a reasonably competent attorney when objectively viewed, and (2) but for trial counsel's unreasonable conduct, there was a reasonable probability the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Here, defendant has failed to demonstrate that defense counsel's failure to request an instruction on the lesser included offenses of second-degree home invasion and unlawful entry was objectively unreasonable. The decision to proceed with an all-or-nothing defense whereby the jury must either acquit or convict the defendant on the charged offense is a legitimate trial strategy. See *People v Rone* (*On Second Remand*), 109 Mich App 702, 718; 311 NW2d 835 (1981). Had defense counsel requested an instruction on a lesser included offense, it would have greatly reduced defendant's chances of an outright acquittal given his concession that he did not have permission to be in the Insanas' home. It cannot be said that employing a strategy that would allow your client to avoid any jail time is objectively unreasonable.

Finally, defendant argues that the court erred in denying his motion for a *Ginther*[1] hearing on the issue of defense counsel's failure to request lesser included instructions. A defendant is not entitled to a *Ginther* hearing as a matter of right. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). The defendant must demonstrate that there are factual issues regarding his or her counsel's performance that require further inquiry. *Id*.

Defendant argues that an evidentiary hearing is necessary because several factual matters need to be developed. In essence, defendant asserts that a factual record needs to be developed to investigate why counsel did not ask for lesser included instructions. Was it, defendant speculates, because (1) counsel did not know he could make such a request, (2) counsel did not know the cited charges were lesser included offenses, or (3) counsel followed an all-or-nothing strategy? These conjectures do not establish the need for a hearing. Indeed, in all cases where counsel fails to adopt a course of action an inquiry could be made into counsel's knowledge of the options available. Counsel is presumed competent unless it is shown otherwise. Such competence would include an understanding of the legal avenues available at all points in the proceedings. Further, contrary to defendant's argument, the record supports the trial court's finding that defense counsel followed an all-or-nothing strategy.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).